Supreme Court, U.S.
FILED

No. 00-

001239 JAN 30 2001

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IN THE

Supreme Court of the United States

BOBBY MILLS,

Petitioner,

—v.—

HOME DEPOT, U.S.A., INC., a foreign corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Question Presented for Review

Whether the Circuit Court of Appeals for the Eleventh Circuit failed to follow the applicable federal law established in the decisions of this Honorable Court by not considering evidence of other discriminatory acts by Home Depot as circumstantial evidence that created a factual dispute as to whether the firing of Mr. Mills for "conduct unbecoming" was only a pretext for a racially motivated termination by Home Depot.

List of Interested Persons and Corporate Disclosure Statement

Hn. Patricia A. Seitz, United States District Judge

Guy B. Bailey, Jr.

Bailey & Harper, P.L.

Bailey Harper Baker Arencibia & Agudo, P.A.

Wm. Bruce Harper, Jr.

James Feltman, Chapter 7 U.S. Bankruptcy Trustee for Bandsawe Corp.

Home Depot, U.S.A., Inc.

Bobby Mills

TABLE OF CONTENTS

	PAGE
Question Presented for Review	i
List of Interested Persons and Corporate Disclosure Statement	ii
Table of Contents	iii
Table of Authorities	iv
Statement of Jurisdiction	1
Statement of the Case	1
Argument	4
Conclusion	7
Appendix	1a

TABLE OF AUTHORITIES

Cases:	PAGE
Batey v. Stone, 24 F 3d 1330 (11th Circ. 1994)	4
Hairston v. Gainesville Sun Publishing Co., 9 F 3d 913 (11th Circ. 1993)	4
Mc Cabe v. Sharrett, 12 F 3d 1558 (11th Circ. 1994)	7
Miranda v. B&B Cash Grocery Store, Inc., 975 F 2d 1518 (11th Circ. 1992)	5
St. Mary's Honor Center v. Hicks, 509 US 502, 113 S.Ct.2d 742, 125 LEd 2d 407 (1993) ...	4

Statement of Jurisdiction

The United States Court of Appeals for the Eleventh Circuit entered its opinion and final judgment in this cause on September 19, 2000 and affirmed the dismissal of Mr. Mills' claim against Home Depot U.S.A.,Inc for violation of Title VII of the Civil Rights Act of 1964, as amended. Mr. Mills' Petition for Rehearing was denied by the United States Court of Appeals for the Eleventh Circuit on November 1, 2000. This Honorable Court has discretionary jurisdiction to review this opinion and final judgment because it is in direct conflict with the holding of this Court's decision in *St. Mary's Honor Center v. Hicks*, 509 US 502, 113 S.CT. 2d 742, 125 L.Ed 2d 407 (1993). Even though Mr. Mills established a prima facie case of discrimination , the court below refused to consider those record facts to subsequently demonstrate the genuine issues of fact as to the truth of the reason proffered by Home Depot for firing Mr. Mills. *Hicks* clearly requires a reviewing court to consider prima facie facts when determining the issue of a pretextual firing. The statutory provision which confers on this Court the jurisdiction to review the judgment in question is 28 USCA § 1254(1).

Statement of The Case

This action was timely filed pursuant to a Dismissal and Notice of Rights entered by the U.S. Equal Employment Opportunity Commission. Originally filed in state court, this cause was removed to the U.S. District Court for the Southern District of Florida on October 20, 1998 based upon federal question and diversity jurisdiction under 28 USC Statutes 1331 and 1332. Federal question jurisdiction existed because the Petitioner Bobby Mills (Mr. Mills) based his claim for relief upon Title VII of

the Civil Rights Act of 1964, as amended. Since Mr. Mills was a resident of the State of Florida and the Respondent Home Depot, U.S.A., Inc. (Home Depot) was a foreign corporation incorporated in the State of Delaware, the District Court also had diversity jurisdiction.

The District Court entered both its Order Granting Defendants Motion for Summary Judgement and Summary Final Judgement on December 28, 1999. The District Court entered its Order Denying Plaintiff's Motion for Relief from Judgement on January 27, 2000. Mr. Mills timely filed his Notice of Appeal on January 27, 2000.

Material Facts

Mr. Mills filed this claim against Home Depot for wrongful termination because of racial discrimination based on the following facts which are undisputed by Home Depot in this record on appeal. These facts are contained in the depositions and exhibits thereto and answers to interrogatories filed herein and were completely overlooked and ignored by the Court below when it reviewed the record.

On September 18, 1997 around 6:30 p.m. Bobby Mills accompanied Juan Morales, Polly Powell and Kristy Hall to an Atlanta Braves baseball game in Atlanta, Georgia. Mr. Morales drove the rental vehicle. Mr. Mills was located in the right front passenger seat. Ms. Powell and Ms. Hall were seated respectively in the left and right rear passenger spaces. Mr. Mills was the only African-American in the car. The other passengers were Anglos.

All four persons in the car were in Atlanta attending a Management Training Seminar given by their employer Home Depot. At the end of the day's training session,

beer was made available by Home Depot to all employees at the hospitality suite where the seminar was held. Mr. Mills had consumed two cups of beer before he left for the game and Ms. Hall took her beer cup with her in the car on the way to the game. It was necessary for this group to follow other Home Depot employees in other cars because no one in Mr. Morales' car knew how to get to the Braves' stadium.

The rush hour traffic on Interstate 285 was described by Mr. Morales as "bumper to bumper at the time and no where to stop". Mr. Mills developed an urge to urinate which quickly progressed to pain and to the point he could no longer refrain from urinating. He complained to the others about his predicament and Ms. Powell stated that she told him to go behind the retaining column out of the public view.

At that point, Mr. Mills did relieve himself by discretely covering himself with his shirt and urinating into the empty beer cup provided by Ms. Hall. Mr. Mills disposed of the urine in the cup outside the vehicle. He did not exit the vehicle to urinate because of "traffic, too much pain from holding the urine and afraid of being arrested for indecent exposure for urinating in public, so what can I do". (Mills' Depo., pg. 35)

Mr. Mills concealed the act of urinating with his shirt. Neither of the females seated in the back seat could see what he was doing. Ms. Powell stated that she could hear and smell the urine when he poured the urine out of the cup outside the car. Ms. Hall stated however, that she could not see, hear or smell Mr. Mills' urination.

The "Associate Performance Notice" prepared by Les Lanier, Regional Loss Prevention Manager for Home Depot and given to Mr. Mills on October 14, 1997, charged that "Bobby's behavior shows a clear lack of

concern for the other associates in the vehicle. This conduct is unbecoming an Home Depot associate". The notice, without stating Mr. Mill's description of his own conduct, then immediately relieved Mr. Mills of his duties as a Loss Prevention Supervisor and permanently terminated his employment with Home Depot.

"Conduct unbecoming" is not defined in the "Associate Performance Notice" or anywhere in the Home Depot "Rules of Conduct" contained in the "Standard Operating Procedures" manual issued by Home Depot to its employees. The Rules of Conduct do prohibit any discrimination or harassment of a Home Depot employee by "failure to treat associates, customers, or vendors with respect". The "Overview" paragraph in the Rules of Conduct states that Home Depot established "standard common sense rules of conduct" necessary for the orderly and efficient way of running a business.

Argument

The established law by this Honorable Court, and previously in the 11th Circuit, is that a claimant may subsequently rely on the record facts previously used to establish a prima facie case to demonstrate the existence of genuine issues of fact as to the truth of the employer's proffered reason for firing the claimant. Once the plaintiff offers evidence that would permit a reasonable fact finder to disbelieve the employer's explanation the discharge, summary judgment is inappropriate. *St. Mary's Honor Center v. Hicks*, 509 US 502, 113 S.CT. 2d 742, 125 L.Ed. 2d 407 (1993). *Hairston v. Gainesville Sun Publishing Co.*, 9 F.3d 913 (11th Circ.,1993) . *Batey v. Stone*, 24 F 3d 13 1330 (11th Circ.,1994)

This record establishes that Mr. Mills, an African-American, is a member of the protected group with an

unblemished record of eight and one half years as a Loss Prevention Supervisor prior to his termination. He was replaced by a non-minority individual. (Mills Depo. Pgs. 7-11). The only sworn testimony in this record about the material facts of the incident leading to Mr. Mills' termination comes from Mr. Mills' own deposition. His testimony about the incident was that he did nothing disrespectful of his fellow employees. To the contrary, his choice to relieve himself in the cup was his only viable option because of the traffic situation. (Mills Depo. Pg. 36.) To have urinated in his pants and on himself in the car would have been far more disrespectful of his fellow employees. Instead, he discretely covered himself and covertly used the cup. Only the unsworn "affidavit" of Polly Powell creates any factual issue that anyone made the slightest protest against Mr. Mills' actions. The sworn testimony of Mr. Mills quite plainly creates a disputed issue as to whether Mr. Mills' conduct was disrespectful of his fellow employees or in any way "unbecoming" in the context of the occurrence. If reasonable minds could differ on the inferences arising from undisputed facts, summary judgment must be denied. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F 2d 1518 (11th Circ. 1992).

The Court below also failed to consider the facts in this record which presented evidence that similarly situated Home Depot employees not members of the protected group were treated more favorably. Mr. Thomas Endter, an Anglo Store Manager for the Respondent, directly admitted to Mr. Mills that he was not terminated by Home Depot despite his sexual harassment of a female Home Depot employee (Mills' Depo. Pgs. 47-49). Mr. Endter's actions described to Mr. Mills were clear cut violations of Home Depot's Rules of Conduct which expressly warn employees that sexual harassment is prohibited and likely to lead to termination. The

record also reveals that Mr. Mills reviewed a *Miami Herald* article that Mr. Paul West, a white Store Manager at Home Depot was publicly identified as a client of Kathy Willets, the infamous South Florida adulteress. However, this "unbecoming" conduct did not result in Mr. West's termination. He was merely transferred to another store.

Similarly, Mr. Charlie Boyd, a white Loss Prevention Supervisor at Home Depot's store no. 211 was identified in an article in the *Miami Herald* which was also reviewed by the Plaintiff as a participant in the Miami firefighters "scrotum on the head" initiation procedure. Home Depot took no disciplinary action on Mr. Boyd's clearly "unbecoming" conduct.

Mr. Mills also reviewed the Home Depot personnel file of one Mark Holloway, a white Department Head at Home Depot's store no. 210. The Defendant took only the minor disciplinary action of placing a notice in Mr. Holloway's personnel file prior to his promotion to Assistant Manager even though he referred Home Depot employee Dwayne Pittman as the "Nigger Driver".

Each of the instances described above demonstrate that Home Depot disciplined Mr. Mills in an entirely different manner (permanent termination) than it did other non-minority managerial employees who committed other violations of Home Depot's Rules of Conduct which were punishable by termination. The remaining five examples given in Answer 3 of Plaintiff's Response to Defendant's First Continuing Interrogatories also describe instances from which it may be inferred that Defendant Home Depot disciplined non-minority employees under entirely different conduct standards than it applied to the African-American employee, Mr. Bobby Mills. Use of the "N word" at Home Depot apparently is "becoming". Since the facts included in the record of this case and all reasonable inferences there-

from must be viewed in the light must favorable to Mr. Mills, a jury question was presented as to whether Home Depot's termination of Bobby Mills, an African-American, for "conduct unbecoming" was merely a pretext used by Home Depot to shroud a racially motivated termination. *McCabe v. Sharrett* 12 F 3d 1558 (11th Circ. 1994).

CONCLUSION

In summary, the facts contained in this record concerning the alleged commission by Mr. Mills of conduct "unbecoming" a Home Depot managerial employee at the very least demonstrate genuine issues of material fact. Whether Mr. Mills' action under the circumstances could be considered less than respectful to other employees and was unbecoming a Home Depot employee is a question for a jury. Since the record also establishes issues of material fact regarding the disparate termination of Mr. Mills, an African American, for questionable "conduct unbecoming", in comparison with the non terminable, slight discipline of white management employees for egregiously unbecoming conduct, a reasonable finder of fact could conclude that Mr. Mills was fired on a pretext. The U.S. Court of Appeals for the Eleventh Circuit did not consider these prima facie record facts of discrimination when it held that the firing of Mr. Mills was not pretextual. The court below failed to follow the law established in *Hicks* and its ruling is in direct conflict with this Court's holding in that case.

Respectfully Submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10696
Non-Argument Calendar
Filed SEP 19, 2000

D.C. Docket No. 98-02427-CV-DAS

BOBBY MILLS,

Plaintiff-Appellant,

—versus—

HOME DEPOT U.S.A., INC., a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Florida

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(September 19, 2000)

Before TJOFLAT, COX and BLACK, *Circuit Judges.*

PER CURIAM:

Appellant Bobby Mills appeals the district court's grant of summary judgment in favor of Appellee Home Depot, U.S.A., Inc., on Appellant's action for wrongful termination brought pursuant to Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(a)(1). On appeal, Appellant claims the district court erred by granting, Appellee's motion for summary judgment by default. Based upon a review of the record, we affirm.

We review de novo the district court's grant of summary judgment. *See Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (2000). In assessing a motion for summary judgment, we must examine the evidence in the light most favorable to the non-moving party. *See id.* A district court may not enter summary judgment solely to sanction a party for failing to respond to a summary judgment motion. *See Dunlap v. Transamerica Occidental Life Ins. Co.*, 858 F.2d 629, 632 (11th Cit. 1988). A district court may, however, grant an unopposed motion for summary judgment when the non-moving party fails to "direct the district court's attention to . . . [evidence] which established that there were genuine issues of material fact." *Id.*

In this case, Appellee demonstrated there was a legitimate, nondiscriminatory reason for Appellant's termination. *See Standard v. A.B.F.L. Services, Inc.*, 161 F.3d 1318, 1334 (11th Cir. 1998). Appellant failed to present evidence showing that this reason was pretextual. *See id.* The district court therefore properly granted summary judgment to Appellee.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-10696-II
Filed NOV 1, 2000

BOBBY MILLS,

Plaintiff-Appellant,

—versus—

HOME DEPOT U.S.A., INC., a foreign corporation,

Defendant-Appellee.

Appeal from the United States District Court for the District of

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Before TJOFLAT, COX and BLACK, *Circuit Judges.*

PER CURIAM:

The petition(s) for rehearing filed by Bobby Mills is DENIED.

ENTERED FOR THE COURT:

/s/ ILLEGIBLE
UNITED STATES CIRCUIT JUDGE